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No. 06-102

FILED
AUG 23 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

SINOCHEM INTERNATIONAL CO., LTD.,

Petitioner,

v.

MALAYSIA INTERNATIONAL SHIPPING CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

KEVIN L. MCGEE
Counsel of Record
ANN-MICHELE G. HIGGINS
RAWLE & HENDERSON LLP
One S. Penn Square, 16th Floor
The Widener Building
Philadelphia, PA 19107
(215) 575-4200

Counsel for Respondent

203039

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

The Court of Appeals for the Third Circuit followed the holding in *Gulf Oil v. Gilbert*, 330 U.S. 501 (1947), in determining that a court must have jurisdiction, and not merely hypothetical jurisdiction, before deciding a motion to dismiss based on *forum non conveniens*.

The question presented is:

Whether Petitioner has presented a compelling reason to grant the Petition, where the Third Circuit's Opinion does not conflict with a decision of this Court.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Malaysia International Shipping Corporation has the following parent corporations:

Malaysia International Shipping Corporation Berhad

Petroliam Nasional Berhad is the only publicly held company that holds 10% or more of the Respondent's stock.

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INTRODUCTION

Petitioner has presented no compelling reason for its Petition for a Writ of Certiorari ("Petition") to be granted. *See* Sup. Ct. R. 10. Specifically, Petitioner has failed to demonstrate that the Third Circuit's Opinion, dated February 7, 2006, presents a compelling reason that is in conflict with a decision of this Court.

Through a slick interweaving of largely irrelevant factors detailing the highlights of a shipowner (Respondent) and its dealings with a Chinese government owned steel importer (Petitioner), Sinochem obfuscates the obvious: A court should have jurisdiction before it hears a dispute. Failure to make that determination before engaging in a time-consuming and costly *forum non conveniens* analysis is not a practice favored by courts, and thus no review is warranted by this Court.

STATEMENT OF THE CASE

As was detailed in the record, Petitioner, Sinochem, appeared first in a U.S. court seeking to have discovery issued related to its desire to arrest vessels in China. MISC, Respondent, instituted the present lawsuit on June 23, 2003, by filing an initial pleading against Sinochem in the United States District Court for the Eastern District of Pennsylvania.[1] Sinochem refused to accept service despite the ready presence of its Pennsylvania or New York counsel, or to sign a Waiver of Service of Summons. Therefore, MISC was required to serve Sinochem, a Chinese corporation, pursuant to the Hague

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1. To clarify the record as stated by Sinochem, the U.S. Complaint was filed before the Chinese Complaint.

Convention.[2] As required by the Hague Convention, MISC had the Complaint translated into Chinese, and then sent a Request for Service Abroad of Judicial or Extrajudicial Documents to the Bureau of International Judicial Assistance, Ministry of Justice of the People's Republic of China. The Amended Complaint ultimately was served on Sinochem on December 15, 2003.

On January 5, 2004, Sinochem filed a Motion to Dismiss the Amended Complaint on various grounds; the district court granted the Motion to Dismiss. The dismissal was based entirely on the doctrine of *forum non conveniens*. The Third Circuit vacated and remanded the action to the district court, after holding that a court must first ascertain the underpinnings of any civil action, namely subject matter jurisdiction but specifically personal jurisdiction, before conducting a *forum non conveniens* analysis.

The district court had determined that this was an admiralty/maritime matter and, therefore, it had subject matter jurisdiction over the case. Sinochem did not appeal this ruling. The district court also determined that limited jurisdictional discovery could establish personal jurisdiction through the federal long-arm statute. Sinochem did not appeal this ruling either.

Although Respondent contests the relevance of much of the factual underpinnings in Petitioner's Petition, pursuant to Sup. Ct. R. 15.2, it corrects the following issues and statements:

• Respondent disputes the characterization that a sizable number of the relevant acts, and most of the relevant witnesses and documents, are located in China.

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2. The Convention on the Service Abroad of Judicial and Extra Judicial Documents in Civil or Commercial Matters, signed at The Hague, November 15, 1965.

• Additionally, rather than "deepen[ing] the split" among the circuit courts, the Third Circuit joins three other circuits in so holding. And indeed, the D.C. Circuit decision has been framed as outdated by reference to subsequent Supreme Court rulings. Finally, a cogent analysis by the Third Circuit addresses any remaining concerns to the Second Circuit decision referenced.

• Respondent disputes Petitioner's assertion that MISC accepted the Chinese Court as an adequate forum for a negligent misrepresentation claim based on a bill of lading. It is beyond the realm that Petitioner believes that a Malaysian shipowner would institute suit in China for negligent misrepresentations made by a Chinese government-owned company, versus some other venue such as the United States (where the vessel loaded), or Malaysia (corporate home of the shipowner).

• Any potential "waste of resources" required under the Third Circuit ruling, to the extent there are any, rests only with this case. There is certainly no suggestion of that issue moving forward, as the court's opinion lays out a clear and simple standard, based on court precedent.

REASONS FOR DENYING THE PETITION

This Court addresses the issue of the application of the doctrine of *forum non conveniens* with regard to personal jurisdiction in its opinion in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). The language pertaining to jurisdiction is clear and unequivocal. This Court held that "[i]ndeed, the doctrine of *forum non conveniens* can never apply if there is absence of jurisdiction or mistake of venue." *Id.* at 504. (emphasis added). In fact, the holding is premised on prior cases, where historically the Court has held that absent a finding of jurisdiction, the federal courts are powerless:

> Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.

Ex parte McCardle, 74 U.S. 506, 514 (1868).

The Third Circuit decision presents a compelling rationale for its holding, and it is not in conflict with this court. Without the finding of both subject matter jurisdiction and personal jurisdiction, a federal court cannot proceed to adjudicate other issues – including a determination of *forum non conveniens*. Petitioner argues that there has been some dispute among the Circuits as to whether *forum non conveniens* is a "non-merits" grounds for dismissal, and, therefore, may be adjudicated prior to the establishment of jurisdiction. The Second Circuit suggests that so long as there is not a constitutional issue involved, a court is not required to analyze jurisdiction prior to ruling on *forum non conveniens*. *In Re Arbitration Between Monegasque De*

Reassurances S.A.M. v. Nak Naftogaz of Ukraine, 311 F.3d 488, 498 (2d Cir. 2002). Similarly, in *In re Minister Papandreou*, 139 F.3d 247 (D.C. Circuit 1998), the D.C. Circuit held that *forum non-conveniens* is a "non-merits" grounds for dismissal which can be undertaken without first deciding jurisdictional issues. *Papandreou* at 255. (Note: *Papandreou* was decided prior to the Supreme Court's decision in *Ruhrgas, AG v. Marathon Oil Co.*, 526 U.S. 574 (1999).)

As the Third Circuit noted in its opinion, the Fifth Circuit expressly rejected the holdings of its sister circuits as to *forum non conveniens*. In *Dominguez-Cota v. Cooper Tire & Rubber Co.*, 396 F.3d 650 (5th Cir. 2005), the Court held that *Ruhrgas* cannot be "stretched" to encompass non-merits issues, such as *forum non conveniens*. The Third Circuit then went on to highlight decisions by other circuits in accord (the Seventh and the Ninth), and distinguished cogently the deficiencies in the Second Circuit opinion, and the timing of the D.C. Court opinion in relation to subsequent Supreme Court rulings.

The notion of discovery for the purpose of establishing personal jurisdiction is not new to district courts. In *Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 455-458 (3d Cir. 2003), the Third Circuit held that the district court erred in **not** allowing jurisdictional discovery. (emphasis added). Respondent respectfully disagrees that the requirement for ascertaining jurisdiction results in judicial inefficiency. Specifically, it is appropriate that if the need for an examination of personal jurisdiction is required, the parties can undertake the bulk of the action on their own, without court intervention. Compare that with the intensive and time-consuming analysis that takes place under the existing *forum*

non conveniens analysis, and one will acknowledge that the goals of Fed. R. Civ. P. 1, to "secure the just, speedy, and inexpensive determination of every action", are in fact achieved.

Respondent also disagrees with Petitioner's assertion that reversal of the Third Circuit will further respect other nations' judicial systems. Fortunately, the court in China disagreed with that notion as well, and as noted by the Third Circuit, the Chinese High Court determined that: "Given that the People's Republic of China and the U.S. are different sovereignties with different jurisdictions, whether [MISC] has taken actions at any U.S. court in respect of this case will have no effect on the exercise by a Chinese court of its competent jurisdiction over said case."

Respondent further maintains that the Petition should be denied because, contrary to petitioner's assertion, the Third Circuit rule is indeed more efficient. An analysis of time would clearly show that courts spend significant resources on conducting a *forum non conveniens* analysis. Ascertaining the presence of jurisdiction first will result in fewer such exercises, and thus does not empty the quiver so quickly as the Third Circuit portends.

CONCLUSION

The district court committed reversible error in not ordering limited discovery to allow Respondent to attempt to establish personal jurisdiction over Petitioner, Sinochem International Corp., pursuant to the federal long-arm statute. Indeed, the district court had no constitutional authority to proceed in this matter and address Petitioner's claim of *forum non conveniens* until proper jurisdiction has been established. The Third Circuit decided the question correctly, and also provides a clear rule such that further review by this Court is not necessary. Accordingly, Petitioner has not established any compelling reason for this Court to grant the petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

KEVIN L. MCGEE
Counsel of Record
ANN-MICHELE G. HIGGINS
RAWLE & HENDERSON LLP
One S. Penn Square, 16th Floor
The Widener Building
Philadelphia, PA 19107
(215) 575-4200

Counsel for Respondent